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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAUL JOE ALDRETE, Defendant and Appellant.	E058885 (Super.Ct.No. FBA1200169) OPINION

APPEAL from the Superior Court of San Bernardino County. John B. Gibson, Judge. Affirmed.

Jeffrey R. Lawrence for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne McGinnis and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Raul Joe Aldrete, guilty of (1) assault with a firearm (Pen. Code, § 245, subd. (a)(2));[1] (2) willfully inflicting corporal injury upon a cohabitant (§ 273.5, subd. (a)); and (3) being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The jury found true the allegation that defendant personally used a firearm in connection with the assault conviction. (§ 12022.5, subd. (a).) The trial court found true the allegations that defendant suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior convictions that resulted in prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for a term of 37 years to life.

Defendant raises four issues on appeal. First, defendant contends there is a lack of substantial evidence for his assault conviction (§ 245, subd. (a)(2)) and his corporal injury conviction (§ 273.5, subd. (a)). Second, defendant contends the trial court erred by finding his prior conviction, for negligently discharging a firearm (§ 246.3), constituted a strike in the instant case. Third, defendant asserts the prosecutor committed misconduct during closing argument. Fourth, defendant contends his trial counsel rendered ineffective assistance. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

In March 2012, defendant and the victim were living with one another and engaged to be married. Defendant and the victim regularly spent time with their friend, Katherine Blackford. At the time, Blackford was abusing methamphetamine and had

[1] All further statutory references are to the Penal Code unless otherwise indicated.

been abusing the substance for 13 years. Blackford "got in trouble with the cops an awful lot." The victim had spent "a good amount" of her life in custody. Blackford observed defendant to be jealous of the victim's activities. For example, when defendant left the house, nobody was allowed to visit, and when defendant returned to the house he would "freak[] out on" the victim, asking, "Who was in the house? Who was fucking in the house? I seen your man going out the back."

One day, Blackford noticed a bandage on the victim's arm. Within a couple of days of noticing the bandage, Blackford was "getting high" at defendant and the victim's house. While at the house, Blackford spoke to defendant. Defendant said "he 'shot that bitch,' and that he would do it again too if she kept on fucking with him." Defendant explained he shot the victim accidentally in that the gun fired when he set it down near the bathroom sink; however, he also stated that "he would do it again."

On March 27, 2012, Barstow Police Detective Angel Nevarez was investigating a series of burglaries. During that investigation, Nevarez spoke to Blackford because he believed she had information about a possible burglary suspect. While Nevarez and Blackford were speaking, Blackford informed Nevarez a shooting had occurred.

Nevarez went to defendant's and the victim's house. Nevarez spoke to the victim, who had a black eye and bruising on her arms. The victim told Nevarez that defendant caused the black eye and arm bruises and that he had struck her five to six times. The victim received the black eye approximately five days before Nevarez arrived at the house.

The victim told Nevarez her arm was injured, i.e., the shooting injury, when she struck a pole; however, the victim was lying to Nevarez. Nevarez told the victim her injury was inconsistent with striking a pole. The victim asked Nevarez "if there was any way [she] could get [defendant] off." At trial, the victim admitted writing a statement in which she took responsibility for causing her gunshot wound. In the statement, the victim wrote she found the gun and caused herself to be shot. The victim admitted to "ma[king] that story up," in order to "get [defendant] out of trouble."

Also at trial, the victim said she loved defendant and still cared for him. The victim testified that she was in the bathroom washing a shirt when defendant entered the bathroom. Defendant looked out the bathroom window and said, "Which one of you lurkers want[s] to get shot tonight?" Defendant turned around, so as to embrace the victim, moved to set the gun on the back of the toilet, and the gun fired. The victim explained that after she was shot, she argued with defendant about his accusations of her being unfaithful.

While Nevarez was at defendant and the victim's house on March 27, at approximately 2:10 p.m., he surveyed the bathroom. When Nevarez returned to the house approximately 45 minutes later, he noticed a towel rack and towel had been removed from the bathroom wall. Nevarez noticed a hole behind where the towel had been—between where the two arms of the towel rack had been. Nevarez noticed there was a hole on the other side of the drywall as well, in a room connected to the kitchen. The hole in the bathroom wall was approximately four feet up from the floor. The hole in the other side of the drywall was approximately three feet 10 inches from the floor.

The wound on the victim's arm was "very close" in height to the hole in the bathroom wall; the wound was slightly above the hole in the wall. A trajectory rod followed from the hole on the other side of the drywall led to a portion of the tile floor that was broken. A search of the house did not reveal a gun or a bullet. Nevarez did not question anyone as to why the towel rack was re moved.

Diana Francis, Barstow Police Department's Senior Crime Scene Investigator and Evidence Technician, viewed the victim's wound on March 27th. To Francis, the wound appeared to be a gunshot wound wherein the bullet entered and exited the victim's body. Francis also observed the hole in the bathroom wall, which she determined was a bullet hole. Francis explained that the bullet traveled in a downward direction, from a higher location to a lower location. Bullets travel in straight lines until they strike something.

Arthur Thomas, the victim's brother, spent time with the victim and defendant at Thomas's home in March 2012. During that time, Thomas witnessed a dispute between the victim and defendant. During the dispute, defendant struck the victim. Thomas did not intervene. Thomas also saw defendant holding a handgun in his hand. At the time, it did not appear defendant was pointing the gun at anyone.

DISCUSSION

A. SUBSTANTIAL EVIDENCE

1. *CONTENTION*

Defendant requests this court "reevaluate all of the circumstantial evidence presented in this case" related to his convictions for assault with a firearm (§ 245, subd.

(a)(2)) and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)). Defendant contends the circumstantial evidence could be interpreted to support a guilty finding, but it could also be interpreted to support a finding that defendant is not guilty. As a result, defendant seeks an objective reevaluation of the evidence presented at trial.

2. *STANDARD OF REVIEW*

Under the substantial evidence standard of review, "'"the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination. . . ."'" (*People v. Peterson* (2012) 211 Cal.App.4th 1072, 1085.) "'"We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact." [Citation.]' [Citation.] We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, whether the evidence is direct or circumstantial. [Citation.] If the circumstances reasonably justify the trier of fact's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citations.]" (*Ibid.*)

3. *REEVALUATING THE EVIDENCE*

This court cannot reevaluate or reinterpret the evidence. (*People v. Peterson*, *supra*, 211 Cal.App.4th at p. 1085.) Accordingly, we deny defendant's request for an objective reevaluation of the evidence. Since defendant has raised a substantial evidence issue, we will briefly explain why the evidence is sufficient to support the assault and domestic violence convictions.

4. *ASSAULT WITH A FIREARM*

Assault "'requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.' [Citation.] 'The mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. . . .'" (*People v. Golde* (2008) 163 Cal.App.4th 101, 108, fn. omitted.)

The evidence reflects the bullet traveled in a downward trajectory. The victim's bullet wound was approximately four feet from the floor. Based upon this evidence, the jury could reasonably conclude the gun was not accidentally fired while being placed on the sink or back of the toilet because those places would have been too low—the bullet would have been traveling upward, rather than downward, if the gun had fired while being laid down. Additionally, defendant told Blackford "he 'shot that bitch,' and that he would do it again too if she kept on fucking with him." Defendant's statement reflects an admission that he was the shooter. It also reflects the shooting was intentional because he said he "would do it again." The statement indicates the shooting was intentional because one typically does not say that one will repeat an accident.

Further, the victim said she fought with defendant about her infidelity after being shot. There was evidence that defendant was jealous of the victim's other suitors. Before shooting the victim, defendant looked out the window and said, "Which one of

you lurkers want[s] to get shot tonight?" The "lurkers" could refer to the victim's other suitors, indicating defendant was in a jealous mindset at the time of the shooting. Defendant's jealousy helps to explain his motivation for intentionally shooting the victim.

In sum, given the trajectory of the bullet, defendant's statement about repeating the shooting, and the evidence of defendant's jealousy, the jury could reasonably conclude defendant intentionally shot the victim. Accordingly, there was an intentional act. Firing a gun at another person is an act that by its nature will probably and directly result in injury to another. Accordingly, there is substantial evidence to support defendant's conviction for assault with a firearm (§ 245, subd. (a)(2)).

5. *CORPORAL INJURY*

a) Act Comprising the Offense

There is a dispute as to what act comprises defendant's conviction for corporal injury upon a cohabitant. Defendant asserts he was charged with domestic violence occurring on the same day as the shooting, March 20, 2012. Defendant contends the evidence reflects the victim received a black eye on a different day than the shooting. Therefore, defendant reasons the shooting is the act comprising the domestic violence conviction.

In the second amended information, the prosecutor alleged the domestic violence occurred "[o]n or about March 20, 2012." In the prosecutor's closing argument, he asserted the domestic violence charge was comprised of the act that caused the victim's black eye. The victim told Nevarez that defendant caused the black eye and arm bruises

and that he had struck her five to six times. The victim said the shooting happened on a different day than the black eye. The victim estimated the black eye occurred on March 22, 2012.

We will treat the domestic violence offense as being comprised of the black eye incident, since the charging document gave an approximate time range, and the evidence reflects the offense occurred within two days of the approximated date. (See § 955 [precise time of an offense need not be alleged in the accusatory pleading].)

b) Substantial Evidence

Section 273.5, subdivision (a), is violated when a "corporal injury results from a direct application of force on the victim by the defendant." (*People v. Jackson* (2000) 77 Cal.App.4th 574, 580.)

The victim testified that defendant caused her black eye. Nevarez saw the victim's black eye, and the victim's black eye was photographed. This evidence reflects the victim suffered a corporal injury because she incurred bruising around her eye. The victim said defendant hit her approximately five or six times. This evidence reflects defendant applied force directly upon the victim by striking her. Additionally, the repeated strikes reflect defendant's actions were willful, as opposed to accidental. Accordingly, there is substantial evidence of defendant willfully applying direct force upon the victim and causing a corporal injury. As a result, we conclude substantial evidence supports defendant's conviction for willful infliction of corporal injury. (§ 273.5, subd. (a).)

B. STRIKE OFFENSE

1. *PROCEDURAL HISTORY*

The second amended information included allegations of three prior strike offenses: (1) dissuading a witness (§ 136.1, subd. (b)(1)), in September 2003; (2) assault with a deadly weapon (§ 245, subd. (a)(1)), in May 2001; and (3) willful discharge of a firearm in a grossly negligent manner, which could result in injury or death to another person (former § 246.3), in August 2000. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).)

On August 13, 2012, the trial court held a bifurcated bench trial on the allegations of defendant's prior offenses. The trial court was unable to determine if defendant's prior assault conviction was for (1) assault with a deadly weapon, or (2) assault with force likely to produce great bodily injury. As a result, the trial court concluded the prior assault conviction was not a strike offense for purposes of this case. The court found defendant suffered prior convictions for both witness intimidation (§ 136.1, subd. (b)(1)), and willfully discharging a firearm in a grossly negligent manner, which could have resulted in injury or death to another person (§ 246.3).

On April 30, 2013, defendant filed a motion moving the court to strike the negligent discharge of a firearm strike (§ 246.3). Defendant asserted the crime of negligently discharging a firearm was not listed among the qualifying serious offenses in section 1192.7, or the violent offenses in section 667.5. Defendant explained the crime was a strike because it falls within the firearm catch-all provision, in that any felony committed while personally armed with a firearm is a serious felony. (§ 1192.7,

subd. (c)(8).) Defendant further explained there was a loophole if one aids and abets the negligent shooter, but conceded that "was not the case here." Defendant argued that the negligence aspect of the offense sets it apart from other strike offenses. Further, defendant noted he was given five years probation and a year in jail for the offense, rather than a prison term, which would normally be associated with a strike offense. At a hearing on May 3rd, the trial court denied defendant's motion to strike the prior strike conviction.

2. *ANALYSIS*

Defendant contends the trial court erred by denying his motion to strike the section 246.3 strike because there is no evidence supporting a finding that defendant personally used the firearm. Therefore, defendant asserts the trial court should have presumed the conviction was for the least serious form of the offense, which would be aiding and abetting.

We apply the abuse of discretion standard of review. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Former section 246.3 provided, "[A]ny person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison." Section 1192.7, subdivision (c)(8) includes as a violent felony "any felony in which the defendant personally uses a firearm." If a person is convicted of violating section 246.3 as an aider and abettor, then that conviction would not constitute a strike because the

aider and abettor did not personally use a firearm during a felony. (*People v. Golde*, *supra*, 163 Cal.App.4th at p. 112.)

In the instant case, in the motion to dismiss the section 246.3 strike prior, defendant conceded he did not commit the section 246.3 offense as an aider and abettor. Specifically, defendant wrote, "The only loophole is if one merely aids and abets the negligent shooter, *which was not the case here*, then PC §246.3 would not be a strike." (Italics added.) The concession was made in the motion filed on April 30, 2013. The trial court denied the motion on May 3rd. Additionally, at defendant's 2003 plea hearing for the dissuading a witness offense (§ 136.1, subd. (b)(1)), defendant admitted his prior conviction for violating section 246.3 constituted a strike. A reporter's transcript from the 2003 hearing reflects the trial court asked defendant if he admitted suffering a strike prior, in particular, a prior conviction for violating section 246.3. Defendant responded, "Yes."

While there is not evidence of the exact manner in which defendant committed the section 246.3 offense, it appears such evidence was unnecessary given defendant's concession that he did not act as an aider and abettor. If defendant did not act as an aider and abettor, then he personally used the firearm. By personally using the firearm, the offense qualifies as a strike. (§ 1192.7, subdivision (c)(8).) Accordingly, the trial court did not err.

C. PROSECUTORIAL MISCONDUCT

1. *PROCEDURAL HISTORY*

During closing argument the following exchange occurred:

Prosecutor: "Now there was evidence that [the victim] on the day of the accident did get [*sic*] different stories in terms of the pole, and then as well the gunshot. And I don't—this is the thing I want you to be careful about, I genuinely believe that she genuinely believes that it was accidental.

"[Defense Counsel]: Objection. Vouching.

"The Court: Excuse me?

"[Defense Counsel]: Vouching for the witness. Vouching. Wish to approach.

"The Court: Sure:

"(Whereupon a bench conference was held on the record.)

"The Court: We're up here at bench. And my understanding of the law he's certainly entitled to argue that a witness should be believed or is credible or not, depending on the witness, but he has one.

"[Defense Counsel]: I believe, genuinely believe what the witness believed? You can't do that.

"[Prosecutor]: I think it was inappropriate.

"The Court: Objection sustained. Now, wait. Do you want me to admonish the jury?

"[Defense Counsel]: No. I just—if he strikes it, we'll be fine.

"The Court: Very well.

"(Whereupon, the bench conference ends.)

"[Prosecutor]: Let me correct that. From the evidence, the reasonable interpretation is that [the victim] genuinely believed that it was an accident. That's the

issue. That she genuinely believes that it was an accident. And that's what normal human beings would do put in that situation. So it's not to say that was a lie. It's the most dangerous type of lie, if you will, it's the lies we tell ourselves to make the world a little easier to accept. But it's what she's personally accepted is true. Nevertheless, it's not the truth. If that makes sense. The truth is that [defendant] did shoot her."

2. *ANALYSIS*

Defendant contends the prosecutor committed misconduct during closing arguments by vouching for a witness's credibility. Defendant contends the prosecutor's "sarcastic" and "backhanded" manner of vouching for the victim's credibility was, in reality, an act of vouching for a witnesses' credibility, such as law enforcement witnesses, who indicated the shooting was intentional.

The People contend defendant forfeited the misconduct issue for appeal by declining the court's offer to admonish the jury. "'To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm.' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 734.) Defendant objected, but declined the court's offered admonition. There is nothing indicating that an admonition would not have cured any perceived harm. Accordingly, we conclude the issue has been forfeited. Nevertheless, we will address the merits of defendant's contention because the issue is easily resolved.

"'A prosecutor may make "assurances regarding the apparent honesty or reliability of" a witness "based on the 'facts of [the] record and the inferences reasonably drawn therefrom.'" [Citation.] But a "prosecutor is prohibited from

vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." [Citation.]' [Citation.]" (*People v. Redd*, *supra*, 48 Cal.4th at p. 740.)

The prosecutor said he thought the victim genuinely believed defendant did not intend to shoot her. The prosecutor admitted his comment was "inappropriate." Accordingly, we will assume, based upon the prosecutor's admission of error, that the statement was a prohibited form of vouching. Next, we examine whether the statement was prejudicial.

"[W]here a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. [Citation.]" (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 564.) "When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

The prosecutor said he believed the victim thought the shooting was accidental. To the extent the statement was understood literally, it is supportive of defendant's position. The victim testified the shooting was accidental, and the prosecutor vouched for that explanation of innocence. Thus, if the statement were understood literally there is no likelihood the jury construed or applied the remarks in a manner that would harm defendant.

To the extent the statement was understood as mocking the victim's belief that the shooting was accidental, so as to vouch for the credibility of the witnesses who indicated the shooting was intentional, it is unlikely the jury construed or applied the remarks in a manner that would harm defendant. After the prosecutor made the "vouching" statement, there was a discussion regarding defendant's objection, and then the prosecutor said to the jury, "Let me correct that." The prosecutor then explained why the victim may have believed the shooting was accidental, but that the victim was mistaken. Given the immediate correction and explanation, if the statement were understood in a non-literal manner, it is unlikely the jury construed or applied the remarks in an objectionable manner.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

1. *PROCEDURAL HISTORY*

a) Changing Attorneys

In April 2012, at defendant's preliminary hearing, he was represented by Jon Mahlum, a member of the conflict defense panel. The felony complaint charged defendant with (1) attempted murder (§§ 664, 187, subd. (a)); (2) assault with a firearm (§ 245, subd. (a)(2)); and (3) corporal injury to a cohabitant (§ 273.5, subd. (a)). Detective Nevarez testified at the preliminary hearing and the prosecutor presented exhibits, such as photographs of the victim's gunshot wound and the bullet holes in the wall. The trial court found insufficient evidence for the attempted murder charge, but held defendant to answer for the other charges.

On June 8, 2012, defendant was represented by Ron Powell, a member of the conflict defense panel. Powell represented defendant through the bifurcated trials. Defendant's jury trial began in August 2012. After the bifurcated trials, Powell was relieved as defendant's counsel. Defendant retained attorney Jeffrey Lawrence.

b) Motion for New Trial

Lawrence filed a motion for new trial. In the motion for new trial, defendant contended: (1) there was lack of substantial evidence for his assault and domestic violence convictions; (2) the prosecutor committed misconduct; and (3) Powell rendered ineffective assistance.

In regard to the allegation of ineffective assistance, defendant asserted Powell: (1) failed to request an Evidence Code section 402 hearing for the victim's brother's testimony; (2) performed an insufficient voir dire; (3) should have given an opening statement; (4) should have impeached the victim during cross-examination; (5) failed to sufficiently cross-examine the victim's brother; (6) failed to thoroughly investigate the case and prepare for trial; (7) failed to properly object to Blackford testifying about being scared of defendant; (8) failed to object to the filing of the second amended information, which added the Penal Code section 246.3 strike allegation; (9) failed to request the jury be admonished regarding the alleged prosecutorial misconduct; (10) should have stipulated only that defendant was a felon for purposes of the felon in possession of a firearm charge, rather than stipulating to defendant having suffered two prior felony convictions; (11) should have moved to dismiss for a

Trombetta/Youngblood[2] violation related to the missing towel rack bar; (12) should have requested a *Pitchess*[3] motion concerning Detectives Nevarez and Grieco related to the missing towel rack bar; and (13) should have encouraged defendant to delay the case until after the amendment to the "Three Strikes" law.

c) Defendant's Testimony

Defendant testified at the hearing on the motion for new trial. Defendant recalled speaking to Powell two or three times prior to trial. Powell visited defendant in jail on one occasion. Powell discussed the facts of the case with defendant as well as the theory of the case. Defendant asked Powell to have the trajectory of the bullet investigated and for an investigator to interview the victim. A defense investigator also met with defendant. Defendant said the victim shot herself. The bullet entered and exited her body, struck the towel rack bar, ricocheted in a downward direction, and went through the wall.

Defendant had letters the victim sent him while he was incarcerated. In one of the letters, the victim took responsibility for the shooting, claiming to have shot herself. The victim also wrote that she was under the influence of drugs when she spoke to police, and that the prosecutor would only give her a deal if she testified against defendant. Defendant encouraged Powell to show the letters to the jury. One of the

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[2] *California v. Trombetta* (1984) 467 U.S. 479; *Arizona v. Youngblood* (1988) 488 U.S. 51.

[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

letters also reflected a person other than defendant inflicted the black eye upon the victim. Powell said he did not need the letters and did not take them from defendant.

After the trial ended, defendant learned Powell had a letter from the victim's mother's neighbor, Cynthia Huereque. Huereque wrote that the victim had admitted she shot herself and asked Huereque for medical help. Defendant learned of the letter when he switched attorneys. Powell did not call Huereque as a witness during the jury trial. Defendant explained that another neighbor, Tina, would have given testimony similar to Huereque's, if Powell had called her as a witness.

Defendant explained that the victim was in a romantic relationship with Eleasar Rodriguez. Rodriguez told police the victim had shot herself but also that defendant shot the victim. Defendant explained that Rodriguez was in love with the victim, so "he was covering up for her." Defendant believed the victim's relationship with Rodriguez was the reason "[s]he kept flip flopping" on how the shooting occurred.

Powell told defendant he obtained funding for a bullet trajectory expert who would explain the bullet had ricocheted off the towel rack. However, Powell did not call an expert at trial. According to defendant, during trial, Powell was texting, doodling, and scrolling on his mobile phone. At one point on the second day of trial, defendant thought he smelled alcohol on Powell's breath. On cross-examination, defendant recalled a jailhouse telephone call with his mother wherein she said, "We got rid of the towel bar."

d) Powell's Testimony

Powell also testified at the hearing. Powell has been a licensed attorney since 1994, has never been disciplined by the state bar, and has tried 150 to 200 murder trials. Powell did not force defendant to go to trial, in that it was not as though defendant wanted to delay his trial date and Powell forced him to rush. Powell did not tell defendant that a ballistics expert was needed in the case. Powell did not drink alcohol during the course of the trial.

In regard to the victim's letters to defendant, Powell did not question the victim in depth about the letters because Powell had evidence of a telephone call wherein defendant's Mother spoke to defendant about telling the victim "to think twice about what she was going to say." Powell was concerned it would appear as though defendant's mother told the victim what to write in the letters. As to the towel bar and possible ricochet, Powell was concerned about the evidence that defendant's mother removed the towel bar. Powell wanted to eliminate the possibility that the trial would include evidence of the towel bar being removed by defendant's mother.

Powell's primary strategy for the case was to show that the victim and witnesses were lying and could not be believed, so as to leave the jury without an abiding conviction in any of the evidence. For example, the victim told a variety of different stories regarding how she was injured (self-inflicted gunshot, accidental gunshot, fell into a pole) and Blackford was a long-term drug abuser, who was possibly under the influence at the time the events in the case occurred. The jury was presented with information about the victim's arrests, convictions, and drug use.

As to investigating the case, Powell read the files, read the preliminary hearing transcript, and spoke to defendant. When Powell visited defendant, an investigator accompanied Powell. Powell did not interview the victim. Powell was unsure what version of the shooting the victim would give at trial—being shot by someone other than herself, shooting herself, or falling into a pole. However, since Powell's strategy was to show the victim was not credible due to having given so many different versions of the events, he was not concerned with which version the victim gave. Powell did not give an opening statement in the case because he did not want to be "pinned down," and lose credibility with the jury if the evidence went a different direction than he predicted.

e) Ruling

The trial court denied defendant's motion for a new trial.

2. *ANALYSIS*

a) Contention

Defendant contends his trial attorneys were ineffective. Specifically, defendant asserts: (1) Mahlum and Powell failed to adequately investigate, prepare, and present the defense; (2) Mahlum and Powell failed to communicate with defendant; (3) Mahlum failed to call the recanting victim at the preliminary hearing; (4) Powell failed to create a viable trial strategy; (5) Powell failed to give an opening statement; (6) Powell failed to object to inadmissible evidence; (7) Powell failed to request an Evidence Code section 402 hearing for the victim's brother's testimony; (8) Powell failed to effectively cross-examine the victim's brother; (9) Powell failed to object to the filing of the second amended information; (10) Powell failed to request the jury be admonished following

the alleged prosecutorial misconduct; (11) Powell stipulated to the jury being informed of defendant having suffered two prior felony convictions, for purposes of the felon in possession of a firearm charge, rather than one conviction; (12) Powell failed to sufficiently argue against using defendant's Penal Code section 246.3 prior conviction as a strike; and (13) Powell failed to delay the case until after the amendment of the Three Strikes law.

b) Law

"""'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as [our Supreme Court has] observed: "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' [Citation.] If the record on

appeal ‘“‘sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected,”’ and the ‘claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

c) Prepare and Investigate

Defendant contends Mahlum and Powell failed to adequately investigate, prepare, and present the defense.

“‘It is counsel’s duty to investigate carefully all defenses of fact and of law that may be available to the defendant, and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he was entitled.’ [Citation.]” (*In re Williams* (1969) 1 Cal.3d 168, 175.)

Powell testified that he read the files, read the preliminary hearing transcript, and spoke to defendant. When Powell visited defendant, an investigator accompanied Powell. Powell’s primary strategy for the case was to show that the victim and witnesses were lying and could not be believed, so as to leave the jury without an abiding conviction in any of the evidence. Powell stayed with this strategy. During closing argument, Powell argued, “[The victim is] the reason we’re here. She gave several stories as to each of the injuries that she received. And you’re—you’re left to determine which one to believe. And what my point is, is that who knows what to believe?”

Powell explained that he was aware of the victim's letters and the towel bar evidence, but strategically chose not to use the evidence so as to eliminate the appearance that defendant's mother caused the victim to provide different versions of the events. Further, Powell's choice of defense (a lack of credible prosecution evidence) had the possibility of defendant being found not guilty on all charges, including the felon in possession of a handgun charge. If the jury were left unconvinced by the prosecution's evidence, then it was possible the jury would conclude defendant did not possess the gun. Given Powell's testimony about his investigation and awareness of the evidence, plus his explanations of why he chose not to utilize certain evidence, it can reasonably be concluded that Powell adequately investigated, prepared, and presented the defense.

Defendant further faults Powell for not impeaching the victim to a greater extent, not interviewing Rodriguez about his statement that the victim said she shot herself, not presenting the testimony of Huereque who heard the victim say she shot herself, and not presenting evidence from a ballistics expert about a possible ricochet. Powell could have reasonably concluded that the simplicity of the victim having told multiple versions of the events of the shooting was the strongest evidence in support of a complete acquittal, and complicating that evidence with experts, other witnesses, and extensive impeachment would only detract from the simple point that the victim was the only other person present during the shooting and it was unclear which version of the events, if any, was accurate. Accordingly, we conclude defendant has not established

ineffective assistance of counsel on this point because it falls within the range of professional assistance to choose to keep the evidence simple and direct.

In regard to Mahlum, there is no evidence in the record regarding his thought process or choices. The preliminary hearing transcript reflects Mahlum argued there was no evidence to support an attempted murder charge. The trial court agreed with Mahlum's argument. In regard to the assault charge, Mahlum argued (1) the victim shot herself, and (2) if defendant did fire the gun, there was nothing indicating he shot it intentionally. It appears from the record that Mahlum understood the different versions of the factual events, as well as the law. A reasonable attorney could have chosen to argue the same theories as Mahlum, especially in light of Mahlum's success on the attempted murder charge. Accordingly, given the information available on this record, we conclude Mahlum adequately investigated, prepared, and presented the defense.

d) Communication

Defendant contends Mahlum and Powell provided ineffective assistance of counsel because they failed to communicate with defendant.

Attorneys must keep clients informed of significant developments in the case. (Bus. & Prof. Code, § 6068, subd. (m); Cal. Rules Prof. Conduct Rule 3-500.) Unsatisfactory communication with one's attorney does not necessarily equate with ineffective assistance of counsel. (See *People v. Hart* (1999) 20 Cal.4th 546, 604 ["'[T]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence'"].) The relevant question is not whether there was full communication, but whether any lack of communication

resulted in ineffective assistance. (See *People v. Avalos* (1984) 37 Cal.3d 216, 231 [counsel was prepared despite perceived lack of communication].)

Defendant recalled speaking to Powell two or three times prior to trial. Powell visited defendant in jail on one occasion. Powell discussed the facts of the case with defendant as well as the theory of the case. Defendant asked Powell to have the trajectory of the bullet investigated and for an investigator to interview the victim. A defense investigator also met with defendant. Defendant said the victim shot herself. The bullet entered and exited her body, struck the towel rack bar, ricocheted in a downward direction, and went through the wall. Defendant spoke to Powell about the victim's letters and encouraged Powell to use the letters during trial.

Given defendant's recollections of communicating with Powell about the case, it appears there was an open line of communication between the two. Powell did not always follow defendant's directives, but Powell explained his reasons for doing so. For example, Powell did not use the letters because he was concerned about evidence that would make it appear as though defendant's mother told the victim what to write in the letters. As explained *ante*, the record reflects Powell was adequately prepared for trial. Accordingly, any perceived lack of communication did not result in ineffective assistance of counsel.

In regard to Mahlum, the record includes little information about the communication between defendant and Mahlum. Powell speculated that Mahlum gave copies of the police reports to defendant. The preliminary hearing transcript reflects Mahlum was familiar with the case. He successfully argued against the attempted

murder charge. He also offered two theories as to why the assault charge was not supported by the evidence. Accordingly, as discussed *ante*, the record reflects Mahlum was prepared for the preliminary hearing and provided effective assistance to defendant.

e) Recanting Victim

Defendant contends Mahlum rendered ineffective assistance because he failed to call the recanting victim at the preliminary hearing. At the preliminary hearing, Mahlum argued (1) there was no evidence to support an attempted murder charge; (2) there was no evidence to support a finding defendant intentionally shot the gun; and (3) the victim shot herself. The evidence of a self-inflicted gunshot wound was provided by the testimony of Nevarez. Nevarez explained that defendant said the victim shot herself.

Thus, the version of the story wherein the victim shot herself was presented at the preliminary hearing, and Mahlum argued that theory at the hearing. To the extent one could conclude Mahlum erred by not presenting the victim's testimony in support of the self-inflicted gunshot theory, such error did not prejudice defendant. The trial court explained that the physical evidence did not support the theory. Specifically, the trial court said, "Yet I see nothing in the photograph 1 or photograph 2 that would in any way, shape or form suggest that the gun was within arm's reach of the [bullet] hole in her left upper arm. If indeed she shot herself there should be some sort of stippling there, and there is not." Thus, defendant was not prejudiced by the failure to present the victim's testimony because the trial court rejected the theory based upon the physical evidence. As a result, we conclude defendant has not established ineffective assistance

of counsel. (See *People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*) [defendant bears the burden of proving ineffective assistance of counsel].)

f) Viable Strategy

Defendant contends Powell rendered ineffective assistance because Powell failed to create a viable trial strategy. Specifically, defendant asserts Powell said he was happy the victim testified that she was accidentally shot, which reflects Powell did not understand that an accidental shooting would still permit defendant to be convicted of being a felon in possession of a firearm. Defendant asserts that Powell was covering for himself when he said his strategy was to argue the testimony was too inconsistent to be believable.

At trial, during closing argument, Powell argued, "[The victim is] the reason we're here. She gave several stories as to each of the injuries that she received. And you're—you're left to determine which one to believe. And what my point is, is that who knows what to believe?" Given that Powell relied upon the inconsistent versions of the events when arguing to the jury in trial, it does not appear Powell was "covering" for a lack of a strategy. To the contrary, Powell argued a theory that had the potential result of defendant being acquitted on all charges. Accordingly, we conclude Powell rendered effective assistance.

g) Opening Statement

Defendant contends Powell rendered ineffective assistance by failing to give an opening statement at trial.

The decision of whether to give an opening statement is a matter "of trial tactics and strategy which a reviewing court generally may not second-guess. [Citation.]" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) When faced with uncertainty about what the prosecution's evidence will ultimately show, a reasonably competent attorney may choose "to wait to hear the prosecution's case before deciding whether to present a defense." (*Ibid.*)

Powell said he did not give an opening statement because he did not want to be "pinned down," and lose credibility with the jury if the evidence went a different direction than he predicted. This evidence reflects Powell made a strategic choice. Given that the victim had told a variety of stories about the shooting, a reasonable attorney could make the same decision as Powell because one could not be certain about exactly what version of events the victim would give at trial. Rather than promise the jury specifics, which then fail to appear, Powell reasonably elected not to give an opening statement. Accordingly, we conclude Powell provided effective assistance.

h) Inadmissible Evidence

Defendant contends Powell rendered ineffective assistance by failing to object to inadmissible evidence. Specifically, defendant asserts the domestic violence offense (§ 273.5) was alleged to have occurred on the same day as the shooting. Therefore, Powell should have objected to the evidence reflecting defendant struck the victim five days after she was shot. Contrary to defendant's position, the domestic violence was alleged to have occurred "[o]n or about March 20, 2012." Thus, the date was an

approximation. As a result, Powell did not err by not objecting to the domestic violence evidence.

Next, defendant contends Powell erred in objecting to Blackford's statement that she was scared to testify because she feared defendant may harm her or her son. Powell objected to the testimony on the grounds of speculation and lack of foundation, and his objection was overruled. Defendant asserts Powell should have objected on the bases of (1) irrelevance, (2) improper use of character evidence, and (3) the evidence being more prejudicial than probative (Evid. Code, § 352).

Defendant fails to explain why these three bases are more proper than the two bases selected by Powell, so it is unclear why defendant believes these three bases would have resulted in the objection being sustained. Our Supreme Court has explained, "'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court. [Citations.]' [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 668.)

Given the foregoing Supreme Court law regarding witnesses testifying about fears of retaliation, we cannot infer why defendant believes his three bases for objecting would have been successful. Since defendant offers no explanation, we conclude Powell rendered effective assistance. (See *Lopez*, *supra*, 42 Cal.4th at p. 966 [defendant bears the burden of proving ineffective assistance of counsel].)

i) Evidence Code Section 402 Hearing

Defendant contends Powell was ineffective because he failed to request an Evidence Code section 402 hearing regarding the victim's brother's testimony. Powell explained that he strategically chose not to have an Evidence Code section 402 hearing for the victim's brother (Thomas). Powell believed Thomas was "slow and perhaps drunk," and therefore, did not want to give Thomas an opportunity to testify and then "think about the mistakes he'[d] made the first time." In other words, Powell thought that by not having the Evidence Code section 402 hearing, Thomas would present as less credible because he would not have an opportunity to refine his answers to Powell's questions.

Given that Powell's strategy for the trial was to argue that the prosecution's witnesses lacked credibility, it was reasonable for Powell to want to prevent Thomas from having the opportunity to think about Powell's questions. A reasonable attorney following Powell's trial strategy could have made the same decision. Accordingly, we conclude Powell rendered effective assistance.

j) Cross-examination

Defendant contends Powell rendered ineffective assistance because he failed to effectively cross-examine Thomas.

When Nevarez testified, Powell asked if he recalled Thomas saying Thomas heard the victim say "she flipped the gun around and the gun went off, but he didn't believe that's what happened." The prosecutor objected on the basis of hearsay. The

trial court sustained the objection. Defendant contends Powell should have cross-examined Thomas about this alleged statement.

Powell could reasonably conclude that questioning Thomas about the victim's statement could be problematic because it would not benefit defendant to have Thomas say he did not believe the gunshot wound was self-inflicted. Defendant was better served by having the self-inflicted gunshot wound theory remain a possibility. A witness discrediting the self-infliction theory would have only harmed defendant. Powell explained that he did not ask the question of Thomas because he felt it was sufficient that the question was asked to Nevarez in that he "still got the question out in front of the jury." Accordingly, we conclude Powell's decision to not question Thomas about the statement fell within the range of reasonable professional assistance because it reflects a reasonable tactical choice. Therefore, we conclude Powell rendered effective assistance.

k) Second Amended Information

Defendant contends Powell rendered ineffective assistance by failing to object to the filing of the second amended information, which added the section 246.3 prior strike allegation. Defendant asserts Powell should have objected because (1) trial had begun prior to the filing of the second amended information, which resulted in a lack of notice, and (2) discovery was not initially provided on the section 246.3 prior strike allegation, which resulted in late discovery.

A trial court has discretion, until defendant's sentencing, to grant leave to amend an information to add allegations of prior felony convictions. (§ 969a; *People v.*

Valladoli (1996) 13 Cal.4th 590, 603.) The second amended information was filed on August 7, 2012. On August 7th, the parties continued voir dire and began presenting evidence on the substantive charges. The bifurcated trial on the allegations of defendant's prior convictions began on August 13th.

Defendant does not explain what result an objection would have procured. For example, it is unclear if defendant is asserting Powell could have obtained a continuance for the bifurcated trial on the prior allegations, or if defendant is contending the second amended information would not have been filed. As a result, it is unclear what prejudice defendant is asserting he suffered due to the lack of an objection. Accordingly, we conclude defendant has not established ineffective assistance. (See *Lopez*, *supra*, 42 Cal.4th at p. 966 [defendant bears the burden of proving ineffective assistance of counsel].)

l) Jury Admonition

Defendant contends Powell rendered ineffective assistance by failing to request the jury be admonished regarding the alleged prosecutorial misconduct discussed *ante*. As set forth *ante*, the prosecutor allegedly improperly vouched for a witness's credibility. Powell immediately objected, but instead of requesting the jury be admonished, he elected to let the prosecutor strike the remark. The prosecutor then told the jury he was correcting his prior remark and proceeded to interpret the evidence.

Defendant does not explain how an admonition would have been better than the path followed by Powell. As a result, it is unclear what prejudice defendant suffered because we cannot determine why defendant believes an admonition would have

created a different result. (See *People v. Vines, supra,* 51 Cal.4th 830, 875-876 [prejudice means the result of the proceeding would have been different].) Accordingly, we conclude defendant has not established ineffective assistance.

m) Stipulation

Defendant was charged with the offense of being a felon in possession of a firearm. (§ 29800, subd. (a).) Powell stipulated that defendant suffered two prior convictions, and the jury was informed of that stipulation. Defendant contends Powell rendered ineffective assistance because he should have stipulated that defendant suffered only one prior conviction. Defendant contends that knowledge of the second felony "left [the jury] to impermissibly speculate that [defendant] must be a dangerous person."

The second amended information charged defendant with committing the offense of being a felon in possession of a firearm, and, in particular, that he had two prior convictions. Arguably, if Powell did not stipulate to both prior convictions, as the crime was charged, evidence of one of the prior convictions could have been given in detail to the jury. Powell made a reasonable decision to stipulate to both prior convictions rather than risk details of one of the offenses being presented to the jury.

Further, defendant does not establish how the jury's knowledge of his second felony impacted the case such that the result of the proceeding would have been different had the jury only known about one of defendant's prior convictions. Defendant is speculating about the jury speculating. As a result, we conclude defendant has not established ineffective assistance.

n) Section 246.3 Prior

Defendant contends Powell rendered ineffective assistance by failing to investigate the allegation of the section 246.3 prior offense. For example, defendant asserts there is no information in the record as to whether defendant committed the prior offense as an aider and abettor. The record does not reflect what, if any, investigation Powell may have conducted into the section 246.3 prior offense allegations. As a result, we cannot conclude that his investigation, if he conducted one, was deficient. Additionally, the record does not reflect that defendant committed the prior offense as an aider and abettor, such that the outcome of the proceeding would have been different if further investigating had occurred. As a result, we conclude defendant has not met his burden of showing ineffective assistance of counsel. (See *Lopez*, *supra*, 42 Cal.4th at p. 966 [defendant bears the burden of proving ineffective assistance of counsel].)

o) Delay

Defendant contends Powell rendered ineffective assistance of counsel because he did not delay the case until after the amendment of the Three Strikes law. Defendant asserts two of his three current offenses may not have qualified as strikes—the offenses qualified as strikes because they involved a firearm. Nevertheless, defendant contends that if Powell had waited to try the case, defendant may have received a better plea offer than 25 years to life.

Powell explained that he did not want to delay the case because (1) defendant's assault charge would have been a strike regardless of the Three Strikes amendment; (2) he was worried defendant may try to intimidate the victim; (3) he was worried the

victim may switch "sides"; and (4) defendant was paranoid about the victim due to defendant's history of abusing methamphetamines. Powell's testimony reflects he made a strategic choice to not delay defendant's trial. Powell's explanations for his decision are reasonable, in that defendant would have had a third strike (assault) regardless of the new law, and by proceeding quickly there was a greater chance of obtaining favorable testimony from the victim. We conclude Powell's performance falls within the range of reasonable professional assistance. Accordingly, we conclude Powell rendered effective assistance.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.